

# 20

## CONSUMER RIGHTS WHEN BUYING A HOME

### § 20. 1. Introduction

This consumer rights chapter describes your rights when you purchase a new home. It contains the following sections:

#### § 20. 2. Buying A Home

#### § 20. 3. Buying A Home Through A Real Estate Agent

#### § 20. 4. Real Estate Agents Can Be Responsible For Misrepresentations

#### § 20. 5. Property Conditions Buyers Should Be Aware Of

#### § 20. 6. Selected Statutes And Rules

#### § 20. 7. Seeking Help

### § 20. 2. Buying A Home

Typically a consumer buys a home either in a private transaction in which the consumer purchases directly from the homeowner or through the agency of a real estate broker. When purchasing a home directly from the homeowner, without the benefit of a broker, it is especially important that the consumer carefully inspect the house before purchasing.

In the past when you purchased a home directly from the homeowner the doctrine of *caveat emptor* (“let the buyer beware”) applied. The owner of the home was under no obligation to volunteer information about defects in the house.<sup>1</sup> However, if you specifically asked about a possible defect (e.g., “Does the roof leak?”), the homeowner was required to answer truthfully.

Today the law offers more protection. Pursuant to 33 M.R.S.A. § 173 (1999) a home owner who is selling a home privately, without the assistance of a broker, must disclose in writing any known defects, whether the home has hazardous materials (e.g. asbestos, lead-based paint, radon), and the condition of the water supply system, insulation, and waste disposal system.

Sellers can also be liable if they sell you a defective title or if they misrepresent the condition of the home.<sup>2</sup> The buyer’s possible remedies in such cases include:

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<sup>1</sup> See *Stevens v. Bouchard*, 532 A.2d 1028, 1030 (Me. 1987) (when an owner of a home sold directly to another party there was no obligation to disclose defects in the home, as long as the homeowner made no false statements, did not act to mislead the potential buyer, and there was no special relationship between parties); but see *Wimmer v. Downeast Properties, Inc.*, 406 A.2d 88, 92 (Me. 1979) (when a builder-vendor sells a home, there is an implied warranty that construction was performed in a reasonably skillful and workmanlike manner).

<sup>2</sup> Misrepresentations can be both a violation of the Maine Unfair Trade Practices Act (5 M.R.S.A. §§ 205-A - 214) or intentional fraud (a tort) (“fraud” requires a significant misrepresentation that the seller intentionally or recklessly made

- A. rescission (cancellation of the contract) and restitution (return of the buyer's money);
- B. specific performance (perform the contract as promised); and
- C. damages (for example, if the seller failed to sell the home as promised, the buyer's damages might be the fair market value of the home on the date the seller refused to sell less any deposit made by the buyer).

In the 1995 New Jersey case of *Strawn v. Canuso*, a court held that builders, developers and brokers may be held liable for nondisclosure of off-site physical conditions (both known and unknown) that are not readily observable by the purchaser, when these conditions have a significant impact on the use or enjoyment of the property and make it substantially less valuable. See *Binette v. Dyer Library Association*, 688 A.2d 898, 906-907 (Me. 1996) (a good faith withholding of known or even unknown material information may constitute an unfair or deceptive act).

Consumers have additional rights when purchasing a home through the services of a real estate agent. Real estate brokers and their employees are licensed and have a duty to buyers to make reasonably certain that all material defects have been disclosed to potential buyers. These consumer rights are further described in § 20.3.

### **§ 20.3. Buying A Home Through A Real Estate Agent**

Traditionally, the client of the real estate agency has been the home seller *not* the homebuyer. In the typical real estate transaction that relationship is created when the seller signs a listing agreement authorizing a real estate agency to sell the client's property. This listing agreement is a contract whereby the seller promises to pay the agency a specified amount of money for procuring a buyer.

Even though the real estate broker is usually an agent of the homeowner, homebuyers can still expect real estate agents to provide them with the following services:

- A. written disclosure of their agency relationship with the seller;
- B. written disclosure regarding private water supply, house insulation, the waste disposal system, and hazardous materials in the home;
- C. no intentional misrepresentations;
- D. disclosure of material information about the property which the agent is aware of or, if acting in a reasonable manner, should be aware of;
- E. showing available properties without regard to race or color, sex, physical or mental handicaps, religion, ancestry or national origin or familial status.<sup>3</sup>

There is now a growing trend of real estate agents representing not sellers, but *buyers*. Today the same agency might have both sellers' agents and buyers' agents. Indeed, it is possible a buyer will hire an agent in a particular agency while the seller of a house the buyer is interested in also hires an agent in the same agency. Or it is even possible that a single agent will try to represent *both* the seller and the buyer (a dual agent).

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and upon which the buyer relied). See *Maine Civil Remedies*, § 14.9 (1992). But see *Saton v. Sontag*, 387 A.2d 33, 37-38 (Me. 1978) (calling a piece of property a "gold mine" was mere puffing and not fraudulent).

<sup>3</sup> See 32 M.R.S.A. § 13067, Causes For Disciplinary Action; see also Rules of the Real Estate Commission, Chapter 330, Minimum Standards of Practice.

Of course, such situations raise the danger of divided loyalties and serious ethical issues. In 1994 the Legislature enacted legislation to specifically deal with such problems.<sup>4</sup> In short, agents involved in such situations must fully disclose in writing their legal identity (buyer's agent, seller's agent, dual agent) and must never act unfairly or deceptively in representing their client. A serious violation of this new law can also be a violation of the Maine Unfair Trade Practices Act.<sup>5</sup>

## **§ 20. 4. Real Estate Agents Can Be Responsible For Misrepresentations**

Maine statutes, regulations and guidelines dealing with the sale of property by real estate agents, have made real estate agents potentially liable for the intentional or negligent failure to disclose material defects in the home being purchased.<sup>6</sup> In general, real estate agents are prohibited from:

- A. Actions which constitute or demonstrate “bad faith, incompetency, untrustworthiness, or dishonest, fraudulent or improper dealings;” and
- B. Making any substantial misrepresentation by omission or commission (this does *not* include *innocent* misrepresentations).<sup>7</sup>

Further, Maine Real Estate Commission Regulations require that real estate agents investigate a home being sold so that the buyer receives adequate disclosure concerning:

- A. Water test results;<sup>8</sup>
- B. Insulation disclosures;
- C. Waste disposal system disclosures;
- D. Known hazardous materials disclosure (including asbestos, lead-based paint, radon, and underground storage tanks).<sup>9</sup>

And when the agent interviews the homeowner about these problem areas, the homeowner must be truthful.

When a real estate agent, either intentionally or negligently, seriously misrepresents the condition of the home being sold the buyer’s potential remedies include:

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<sup>4</sup> 32 M.R.S.A. §§ 13271-13281, Agency Relationships.

<sup>5</sup> Real Estate Commission Rules Chapter 330, § 9; *See* Chapter 3 in this Guide, the Maine Unfair Trade Practices Act.

<sup>6</sup> Reliance by a buyer on representations made by a real estate agent is unjustified only if the buyer knows the agent’s representations are false or their falsity is obvious to him. *See Letellier v. Small*, 400 A.2d 371 (Me. 1979) (defendant is liable for intentionally misrepresenting the results of a soil test for the purpose of inducing the buyer to rely upon the misrepresentation); *see also Russo v. Miller*, 559 A.2d 354, 358 (Me. 1989) (sale of homestead was void because seller was mentally impaired and the buyer used undue influence). *Goldberg Realty Group v. Weinstein*, 669 A. 2d 187, 191 (Me. 1996) (failure by broker for seller to disclose to seller material information resulted in forfeiture of commission).

<sup>7</sup> 32 M.R.S.A. § 13067(1)(A, D). *See Sargent v. Eastern Maine Real Estate Associates, Inc.*, No. Ell-92-CV-106 (Me. Dist. Ct., 5, Cen. Hancock, October 22, 1992) (default judgment; court found that broker committed an unfair trade practice by intentionally failing to disclose to buyer that the house’s filtration system was removed before buyer took possession).

<sup>8</sup> *See Kezer v. Mark Stinson Associates*, 742 A. 2d 898, 902 (Me. 1999) (real estate agency had no duty to disclose to home purchasers environmental hazards in neighborhood, where no evidence the hazard affected the purchaser’s property).

<sup>9</sup> *See* Real Estate Commission Rules Chapter 330, Section 16-19, Buyers’ Remedies.

- A. Consequential damages;<sup>10</sup>
- B. Out of pocket expenses;
- C. Specific performance of promises not kept by real estate agent or seller.

Further, if the misrepresentation was so serious as to be a violation of the Maine Unfair Trade Practices Act then the buyer could request that the contract be rescinded, all monies returned, and that his attorneys' fees be paid. *See* 5 M.R.S.A. § 213; Chapter 3 in this Guide, Maine Unfair Trade Practices. However, a real estate broker or agency is not obligated to discover latent defects in the property (32 M.R.S.A. § 13273(2)(A)).

When the real estate agent is the legal agent of the home seller, the seller is also responsible for any actionable misrepresentations by the real estate agent. Therefore, the buyer who has relied on a real estate agent's misrepresentation can decide to bring an enforcement action against either the agent or the seller or both.

## **§ 20. 5. Property Conditions Buyers Should Be Aware Of**

The Maine Real Estate Commission has provided the following information for buyers considering purchasing a home. It describes the different home conditions that buyers must carefully consider:

### ***A. Structural Integrity And Condition***

The structural integrity and condition of a property includes such components as foundation, roof, heating, plumbing and electrical systems. Conditions vary greatly from house to house, and since most buyers and real estate agents are not experts in these areas, buyers are encouraged to request an evaluation of the property by a qualified home inspector. A home inspection is one of the surest ways to determine and confirm structural integrity and condition. Care should be taken in selecting a qualified home inspector. Ask your realtor for a recommendation or use a licensed engineer or architect. It is in the buyer's best interest to receive a written inspection report. Many buyers like to accompany the home inspector during the evaluation. This is the best time for buyers to ask and receive answers to their questions.

### ***B. Physical Characteristics***

Buyers are encouraged to inquire about state and local laws and regulations which may affect the way the land can be used. Real estate agents are required to confirm, whenever possible, the accuracy of information that they provide about the physical characteristics of a property. These characteristics include such things as lot size, boundary lines and zoning. Agents are required to provide, in writing, information about *water supply, insulation, waste disposal systems, and hazardous materials* (asbestos, lead-based paint, radon, and underground storage tanks). A sample of the information that the agent is required to disclose, in writing, is included in this booklet.

### ***C. Water Supply***

A clean, safe water supply is important to everyone. The quality of water is measured by a simple test which is performed by a qualified testing laboratory. Generally, water testing is not necessary if there is a municipal water supply. Water tests may be performed for private water supplies such as wells. The test report should identify levels of such things as coliform bacteria and hardness. If the buyer is concerned about other possible contaminants (e.g., radon, lead), the buyer should investigate the various types of testing available and request that such testing be performed. Water testing kits are

<sup>10</sup> *See Anuszewski v. Jurevic*, 566 A.2d 742 (Me. 1989) (homeowners suing for breach of construction contract are entitled to recover actual costs to remedy and complete any defective construction work).

available from the Department of Human Services, Health and Engineering Testing Laboratory (207-287-2727).

### ***D. Insulation***

The energy efficiency of a home is an important consideration. While information is not always obtainable, a buyer should be interested in the amount and location of insulation in a home. Keeping in mind individual temperature preference, a review of past heating bills will help to establish a future heating budget.

### ***E. Waste Disposal Systems***

Many homes in Maine are serviced by private waste disposal systems. The age, condition and serviceability of these systems vary greatly. It is in the buyer's best interest to obtain as much information as possible about these systems. If sufficient information is unavailable, further investigation through a maintenance company or plumbing inspector may help to determine the current condition of the system. While the future performance of any waste disposal system is unpredictable, knowing the current condition and demand will minimize unexpected surprises.

Municipal systems also deserve some investigation.

### ***F. Hazardous Materials***

Real estate agents, and their clients and customers, have become aware of the effects of toxic and hazardous substances in the environment. The following are the hazardous substances most commonly found in property.

- (1) *Asbestos*. Asbestos is a mineral fiber, which when inhaled or ingested, may cause a variety of diseases, including lung cancer. Not all asbestos products are a health risk to consumers. A health risk exists only when asbestos fibers are released from the material because the fibers may remain airborne for long periods of time. There are many types of asbestos containing products that have been used in home and building construction. Asbestos has been used, in among other things, vinyl tiles, flooring, siding, furnaces, pipes and roofing. Removal and disposal of asbestos are governed by state and federal regulations. Special precautions are necessary when asbestos is removed, and encapsulation is often favored over removal. A competent asbestos contractor should be consulted.
- (2) *Lead-Based Paint*. Lead-based paint is hazardous when ingested. It can impair physical and mental development of young children and aggravate high blood pressure problems in adults. The greatest health risks are to young children who breathe lead paint dust or eat or chew the flaking, cracking, or peeling paint and to both children and adults during renovations. Lead-based paint is most commonly found in homes built before 1973. Real estate agents, buyers and sellers generally do not possess the technical expertise necessary to determine the presence of lead-based paint in a particular property. All should be sensitive to the presence of peeling and flaking paint which may serve as an indicator that investigation by appropriate health officials is warranted.<sup>11</sup>
- (3) *Radon*. Radon is a colorless, odorless, and tasteless radioactive gas which enters homes and buildings through soil and water. Studies have linked radon gas, when found in high levels of concentration, to lung cancer.

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<sup>11</sup> It may well be a violation of the Maine Unfair Trade Practices Act for an owner or agent to sell or rent a residence that the owner or agent knows poses a serious lead poisoning risk. See 22 M.R.S.A. §§ 1314-1326; 5 M.R.S.A. §§ 207,213; see also Chapter 16 in this Guide, Model Landlord - Tenant Lease (§ 16.3 (EE) describes the landlord's obligation to disclose lead based paint hazards).

In outdoor air, radon is diluted to such low concentrations that it usually is not of concern. However, once inside an enclosed space (such as a home) radon can accumulate. Indoor levels depend on both a building's construction and the concentration of radon in the underlying soil. In most cases, high levels of radon can be reduced significantly by various mitigation measures.

The Maine Department of Human Services recommends testing of indoor air and private water supplies for radon. Public water supplies are monitored by the State. Radon testing services are available through State and private testing laboratories.

- (4) *Underground Storage Tanks.* Underground storage tanks which contain, or which have contained, petroleum products or other hazardous substances pose serious environmental hazards and health risks when tanks corrode, crack, and subsequently leak. Leaks of any kind can seriously contaminate a community's water supply to the point of endangering public health.

Because of public health risks, the Maine Department of Environmental Protection requires that all in-service underground tanks be registered and that all out-of-service tanks be removed. Current owners are responsible for proper registration and removal, and the State may impose heavy fines for noncompliance with the law.

- (5) *Lead in Drinking Water.* Increasingly there are reports of damaging amounts of lead in drinking water. For example, in April, 1994 the Environmental Protection Agency announced that lead can leach into submersible pumps made with leaded brass or bronze parts and that homeowners with such pumps should have their water tested (call EPA at 1-800-426-4791).

## **§ 20. 6. Selected Statutes And Rules**

### **A. 32 M.R.S.A. § 13067(1)**

1. *Disciplinary sanctions.* After the hearing, the [Real Estate] commission shall have the power to impose disciplinary sanctions at any time when a person or entity is found guilty of one or more of the following:
  - A. Any act or conduct, whether the same or different in character than specified in this chapter, which constitutes or demonstrates bad faith, incompetency, untrustworthiness or dishonest, fraudulent or improper dealings;
  - ....
  - D. Making any substantial misrepresentation, by omission or commission, but shall not include innocent misrepresentation;
  - E. Engaging in any activity requiring a license under this chapter which is beyond the scope of acts authorized by the license held;
  - F. Violating any rule promulgated by the commission or any provision of this chapter;
  - G. Failing to act in a reasonably prudent manner in order to protect and promote the interests of the principal with absolute fidelity;
  - H. Failing to act in a reasonably prudent manner in order to avoid error, exaggeration or concealment of pertinent information.

***B. Real Estate Commission Rule Chapter 330, Sections 1, 6, 14, 15-19***

Summary: This rule clarifies and establishes standards for practicing real estate brokerage.

***Section 1. Advertising***

- A. Real estate brokerage related advertising shall be made in the name of the agency as licensed by the Commission. If an agency has licensed a trade name, that trade name shall be used in all advertising.
- B. Real estate brokerage related advertising shall be free from deception and shall not misrepresent any real estate, terms, values, policies or services.

***Section 6. Listing and Selling Licensee's Responsibilities***

- A. A listing licensee shall be responsible for obtaining information necessary to make disclosures to buyers and shall make a reasonable effort to assure that the information is conveyed to a selling licensee.
- B. A selling licensee shall be responsible for obtaining from the listing licensee the information necessary for making disclosures, and for assuring that the disclosures are made to the buyers.

***Section 14. Licensee's Duty to a Customer***

A licensee shall disclose to a customer [home buyer] any material defect of which he has knowledge, or acting in a reasonable manner, he should have had knowledge of, regarding the condition of real estate.

***Section 15. Licensee's Duty to obtain and provide Disclosure Information on Private Water Supply, Insulation, Waste Disposal System and Known Hazardous Materials***

- A. A listing licensee shall be responsible for obtaining information necessary to make disclosures to buyers and shall make a reasonable effort to assure that the information is conveyed to a selling licensee or a licensee representing the buyer.
- B. A selling licensee shall be responsible for obtaining from the listing licensee the information necessary for making disclosures, and for assuring that the disclosures are made to buyers.
- C. A licensee representing the buyer shall be responsible for obtaining from the listing licensee, or the seller in transactions where the property is not listed with an agency the information necessary for making disclosures, and for assuring that the disclosures are made to the buyer.

***Section 16. Private Water Supply Disclosure***

A listing licensee, when listing property served by a private water supply, and a licensee representing the buyer in transactions where the property is not listed with an agency, shall ask the seller for the following information:

- A. Type of system;
- B. Location;
- C. Malfunctions;
- D. Date of installation;
- E. Date of most recent water test; and
- F. Whether or not the seller has experienced a problem such as an unsatisfactory water test or a water test with notations.

Such information and any other information pertinent to the private water supply shall be conveyed, in writing, to a buyer prior to or during preparation of an offer. The fact that information regarding the private water supply is not available shall also be conveyed, in writing, when such is the case.

#### *Section 17. Insulation Disclosure*

A listing licensee, when listing property, and a licensee representing the buyer in transactions where the property is not listed with an agency, shall ask the seller for the following information: (A) type of insulation and (B) location of insulation. In addition the licensee shall make a reasonable effort to inspect visually the following:

- A. Attic;
- B. Crawl space;
- C. Accessible wall cavities;
- D. Exterior walls.

Such information and any other information pertinent to the insulation shall be conveyed, in writing, to a buyer prior to or during the preparation of an offer. The fact that information pertinent to the insulation is not available shall be conveyed, in writing, when such is the case.

#### *Section 18. Waste Disposal System Disclosure*

- A. A listing licensee, when listing property served by a private waste disposal system, and a licensee representing the buyer in transactions where the property is not listed with an agency, shall ask the seller for the following information:
  - 1. Size; Type of system;
  - 2. Type; Size of tank;
  - 3. Type of tank
  - 4. Location of tank;
  - 5. Malfunctions of tank;
  - 6. Date of installation of tank;
  - 7. Location of leach field;
  - 8. Malfunctions of leach field;
  - 9. Date of installation of leach field;
  - 10. Date of most recent servicing of the system; and
  - 11. Name of the contractor who services the system.

Such information and any other information pertinent to the waste disposal system shall be conveyed, in writing, to a buyer prior to or during preparation of an offer. The fact that information regarding the waste disposal system is not available shall also be conveyed, in writing, when such is the case.

- B. A listing licensee, when listing property served by a municipal or quasi-public waste disposal system, shall ask the seller if he has experienced any system or line malfunction. This information shall be conveyed, in writing, to a buyer prior to or during preparation of an offer.



*Section 19. Known Hazardous Materials Disclosure.*

A licensee shall keep himself informed regarding known hazardous materials that may impact negatively upon the health and well being of clients and customers. A listing licensee, and a licensee representing the buyer in transactions where the property is not listed with an agency, shall ask the seller whether or not he has any knowledge of current or previously existing known hazardous materials on or in real estate, including, but not limited to:

- A. Asbestos;
- B. Lead-based paint;
- C. Radon;
- D. Underground storage tanks.

Such information and any other information pertinent to hazardous materials shall be conveyed, in writing, to a buyer prior to or during preparation of an offer. The fact that such information regarding hazardous material is not available shall also be conveyed, in writing, when such is the case. A licensee shall give a written statement to a buyer encouraging that buyer to seek information from professionals regarding any specific issue or concern.

## **§ 20. 7. Seeking Help**

Consumer complaints concerning the practices of a real estate agent should be directed to:

Maine Real Estate Commission  
Department of Professional and Financial Regulation  
35 State House Station  
Augusta, Maine 04333-0035  
207-624-8603

The Maine Real Estate Commission can fine real estate agents who have behaved improperly. However, they cannot guarantee that consumers will receive relief for any damage caused by improper actions by a real estate agent. It may be necessary for the injured homebuyer to bring a private legal action against the agent (or the seller, who is legally responsible for the agent's actions). Also, the Attorney General's Consumer Mediation Service, 6 State House Station, Augusta, ME 04333 207-626-8849 can provide free mediation services. Given the expense of a home purchase, consumers are strongly urged to consult with attorneys as to their legal rights in this area. In order to find additional information about common home buying problems, the Real Estate Commission suggests the following resources:

### ***A. Private Water Supplies, Lead-Based Paint, Radon And/Or Waste Disposal Systems:***

- (1) Department of Human Services  
Division of Health Engineering  
10 State House Station  
Augusta, Maine 04333-0010  
207-287-5338
- (2) Booklets Available to Consumers From the Division of Health Engineering include:
  - (a) "A Citizen's Guide to Radon"
  - (b) "Radon Reduction in New Construction"

- (c) "Radon in Water and Air"
- (d) "Removing Radon From Water"
- (e) "Radon Reduction Levels"
- (f) "Lead and Your Drinking Water"

**B.     *Asbestos:***

- (1) Department of Administration  
Division of Safety and Environmental Services  
77 State House Station  
Augusta, Maine 04333-0077  
207-287-4509
- (2) Booklet Available to Consumers From the Division of Safety and Environmental Services: "Asbestos and the Homeowner"

**C.     *Underground Storage Tanks:***

- (1) Department of Environmental Protection  
Div. of Oil and Hazardous Waste Facilities Regulation  
17 State House Station  
Augusta, Maine 04333-0017  
207-287-7688
- (2) Booklet available to consumers from the Bureau of Oil and Hazardous Materials Control: "Musts for USTS"

**D.     *Insulation And Construction Quality:***

- (1) Department of Economic & Community Development  
Energy Conservation  
53 State House Station  
Augusta, Maine 04333-0035  
207-287-2657
- (2) Booklet available to consumers from the Energy Program Division: "Indoor Air Quality and Your Health"

**E.     *Financing Problems:***

- (1) Department of Professional & Financial Regulation  
Bureau of Financial Institutions  
36 State House Station  
Augusta, Maine 04333-0036  
207-624-8570
- (2) Booklets available to consumers from the Bureau of Banking:
  - (a) "A Consumer's Guide to Understanding Mortgage Points and Other Settlement Costs"
  - (b) "A Consumer's Guide to Home Mortgage Financing in the 1990's"
- (3) Department of Professional & Financial Regulation  
Office of Consumer Credit Regulation  
35 State House Station  
Augusta, Maine 04333-0035  
207-624-8527 or 1-800-332-8529

- (4) Booklets available to consumers from the Office of Consumer Credit Regulation:
  - (a) “Downeaster’s Pocket Credit Guide”
  - (b) “Downeaster Consumer Guide to Credit Bureaus and Credit Reports”

